

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BROWN	)	FIFTH JUDICIAL CIRCUIT
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STATE STREET COMMONS, LLC	)	Civ. No. ___
	)	
Plaintiff,	)	
	)	
vs.	)	<b>COMPLAINT</b>
	)	
TOTAL FRAMING AND DRYWALL, LLC,	)	
	)	
Defendant.	)	
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COMES NOW the Plaintiff, State Street Commons, LLC ("State Street Commons"), by and through its attorney of record, John W. Burke, and for its causes of action states and alleges as follows:

#### **GENERAL ALLEGATIONS**

1. That State Street Commons is, and at all times relevant to this matter was, a limited liability company duly organized and existing under the laws of the state of South Dakota, with its principle place of business in Aberdeen, South Dakota.
2. That Defendant Total Framing and Drywall, LLC ("Total Framing & Drywall") is, and at all times relevant to this matter was, a limited liability company duly organized and existing under the laws of the state of North Dakota, with its principle place of business in Dickinson, North Dakota.
3. That in October of 2015, State Street Commons entered into a *Subcontract Agreement* whereby Total Framing & Drywall agreed to perform certain framing and drywall work required in connection with the construction of an apartment complex in Aberdeen, South

Dakota.

4. That construction of the apartment complex commenced in May of 2012.
5. That in the *Subcontract Agreement*, Total Framing & Drywall agreed, among other things:
  - (a) to "complete the Work pursuant to th[e] Agreement," and "pursuant to th[e] Contract Documents;"
  - (b) that "[a]ny additions or changes to the Scope of the Work [could] only be made pursuant to a written change order pre-approved by [State Street Commons];"
  - (c) to "provide and pay for all labor . . . including proper supervision at all times at the Project site, as required for the full and proper completion of the Work, and all work incidental to the completion of the Work;"
  - (d) to complete all Work "in a good and workmanlike manner according to the Contract Documents and as directed by [State Street Commons]," and to Owner's satisfaction;
  - (e) to not discontinue performance of the Work "unless such a discontinuance [wa]s authorized, in writing, by [State Street Commons];"
  - (f) to "complete its Work in a timely manner which d[id] not delay any other work performed by [State Street Commons] and other subcontractors of the Project;"
  - (g) to be liable for liquidated damages in the amount of \$1,000 per day if it, "through [its] negligence or wrongful acts, fail[ed] to complete the Work on or before the time for completion . . . ;"
  - (h) that "[i]f any lien [wa]s filed and [wa]s not removed by [Total Framing &

Drywall] within thirty (30) days after filing, [State Street Commons] [could] deduct from any sums owed to [Total Framing & Drywall], an amount equal to the amount of any filed lien multiplied by two and one-half (2 ½) . . . ;”

(i) that Total Framing & Drywall would “receive no payment on any change in the Work, or for additional work, unless the changed Work or additional work have been preapproved, in writing, with a change order form executed by Chris Lamont or his authorized Project representative . . . ;”

(j) that if Total Framing & Drywall defaulted in the performance of any of its obligations under the *Subcontract Agreement*, State Street Commons had the right, among other things, to terminate the agreement, and “take over all Work in progress and complete [Total Framing & Drywall’s] Work or hire another subcontractor to complete [Total Framing & Drywall’s] Work,” and that all costs incurred by State Street Commons would “be paid, or reimbursed, by [Total Framing & Drywall];”

(k) that any time that Total Framing & Drywall owed any amount to State Street Commons, or was required to reimburse State Street Commons, State Street Commons “[wa]s authorized to deduct any sums owed from any amount that may be due to [Total Framing & Drywall];” and

(l) if either party “retain[ed] legal counsel to enforce any rights or the other party’s obligations pursuant to this Agreement or applicable law, the prevailing party in any action, claim, arbitration, or mediation shall be entitled to recover attorney’s fees and the costs of such enforcement action.”

6. That in connection with its work on the apartment complex, Total Framing & Drywall failed to timely and fully honor the *Subcontract Agreement*. Among other things, Total Framing & Drywall did not complete the drywall and insulation work. In fact, despite being paid \$110,515.50 in advance for drywall and insulation materials, Total Framing & Drywall never performed the drywall and insulation work or even provided the materials; nor did it return the funds to State Street Commons.

7. That as a direct and proximate result of Total Framing & Drywall's failure to timely and fully honor the parties' contract, defective and/or poor workmanship, and/or failure to provide the \$100,515.50 in drywall and insulation materials for which it received payment from State Street Commons or return the funds, State Street Commons suffered, and is continuing to suffer, damages.

#### **COUNT 1 - BREACH OF CONTRACT**

8. State Street Commons hereby incorporates by reference Paragraphs 1 through 7, inclusive, as though they were fully set forth herein.

9. That when Total Framing & Drywall entered into the *Subcontract Agreement*, it became contractually bound to State Street Commons to take certain actions and perform certain work.

10. That Total Framing & Drywall breached the parties' contract in at least the following respects:

- (a) providing defective and/or poor workmanship, which resulted in State Street Commons having to incur cost and expense correcting the same;
- (b) failing to complete its work, which resulted in State Street Commons having to

incur cost and expense completing the same; and

(c) failing to timely complete its work, which resulted in delays to other subcontractors and delay of the project.

11. That as a direct and proximate result of Total Framing & Drywall's breach of the parties' contract, State Street Commons suffered, and is continuing to suffer, damages.

#### **COUNT 2 - BREACH OF IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE**

12. State Street Commons hereby incorporates by reference Paragraphs 1 through 11, inclusive, as though they were fully set forth herein.

13. That the parties' contract contained an implied warranty that Total Framing & Drywall would perform its work in a skillful, careful, diligent, and workmanlike manner and that its work would be reasonably fit for its intended purpose.

14. That Total Framing & Drywall breached this implied warranty by failing to perform its work in a skillful, careful, diligent, and workmanlike manner, and by failing to complete its work such that it was reasonably fit for its intended purpose.

15. That, as a direct and proximate result of Total Framing & Drywall's breach of this implied warranty, State Street Commons suffered, and is continuing to suffer, damages.

#### **COUNT 3 - NEGLIGENCE**

16. State Street Commons hereby incorporates by reference Paragraphs 1 through 15, inclusive, as though they were fully set forth herein.

17. That Total Framing & Drywall had a duty to use reasonable care in the performance of its work on the apartment complex.

18. That Total Framing & Drywall breached this duty of care in connection with the

performance of its work on the apartment complex.

19. That as a direct and proximate result of Total Framing & Drywall's negligence, State Street Commons suffered, and is continuing to suffer, damages.

#### **COUNT 4 – CONVERSION**

20. State Street Commons hereby incorporates by reference Paragraphs 1 through 19, inclusive, as though they were fully set forth herein.

21. State Street Commons owned or had a possessory interest in the funds (\$100,515.50) that it remitted to Total Framing and Drywall and/or in any drywall and insulation materials purchased with the funds.

22. State Street Commons' ownership or possessory interest in the funds and/or any drywall and insulation materials purchased with the funds was greater than that of Total Framing and Drywall.

23. Total Framing and Drywall exercised control over or seriously interfered with – and continues to exercise control and seriously interfere with – State Street Commons' interest in the funds and/or any drywall and insulation materials purchased with the funds.

24. Total Framing and Drywall's conduct deprived – and is continuing to deprive – State Street Commons of its interest in the funds and/or any drywall and insulation materials purchased with the funds.

25. Total Framing and Drywall's conduct was oppressive, fraudulent, malicious, and/or willful and wanton, thereby entitling State Street Commons to punitive damages to punish, and make an example of, Total Framing and Drywall.

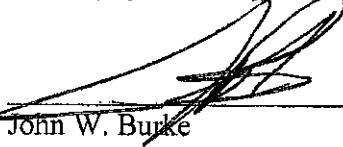
WHEREFORE, State Street Commons respectfully requests that this Court enter a

Judgment against Total Framing & Drywall granting the following relief:

- (a) General, special, and punitive damages to be proven at trial;
- (b) Any and all costs and disbursements incurred in this action, including attorney's fees;
- (c) Pre and post-judgment interest; and
- (d) For such other and further relief as the Court may deem equitable and just under the circumstances.

Dated this 25<sup>th</sup> day of May, 2017.

**THOMAS BRAUN BERNARD & BURKE, LLP**  
*Attorneys for Plaintiff State Street Commons, LLC*

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**PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY ON ALL ISSUES**